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Nos. 04-1507 & 04-1508

IN THE

Supreme Court of the United States

Supreme Court, U.S.
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JUDITH MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MATTHEW COOPER AND TIME INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF ABC, INC., ADVANCE PUBLICATIONS, INC., THE ASSOCIATED PRESS, THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., CABLE NEWS NETWORK LP, LLLP, CBS BROADCASTING INC., DOW JONES & COMPANY, INC., DR PARTNERS D/B/A STEPHENS MEDIA GROUP, GANNETT CO., INC., GRAY TELEVISION, INC., GRUNER + JAHR USA PUBLISHING, THE HEARST CORPORATION, LANDMARK COMMUNICATIONS, INC., MAGAZINE PUBLISHERS OF AMERICA, MEDIA GENERAL, INC., THE NATIONAL NEWSPAPER ASSOCIATION, NATIONAL PUBLIC RADIO, INC., NBC UNIVERSAL, NEWSWEEK, INC., RANDOM HOUSE, INC., REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS, TRIBUNE COMPANY AND THE WASHINGTON POST IN SUPPORT OF PETITIONERS

LEE LEVINE *
DAVID A. SCHULZ
NATHAN E. SIEGEL
THOMAS CURLEY
LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
1050 17TH STREET, N.W., SUITE 800
WASHINGTON, D.C. 20036
(202) 508-1100
Counsel for Amici Curiae

* Counsel of Record

[Additional Counsel Listed Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

Of Counsel:

HENRY S. HOBERMAN
ABC, INC.
77 West 66th Street
New York, NY 10023
Counsel for ABC, Inc.

RICHARD A. BERNSTEIN
SABIN, BERMANT & GOULD LLP
Four Times Square
New York, NY 10036
Counsel for Advance Publications, Inc.

DAVID H. TOMLIN
THE ASSOCIATED PRESS
450 West 33rd Street
New York, NY 10001
Counsel for The Associated Press

JONATHAN BLOOM
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Counsel for The Association of American Publishers, Inc.

DAVID VIGILANTE
JOHNITA P. DUE
CABLE NEWS NETWORK LP, LLLP
One CNN Center
Atlanta, GA 30303
Counsel for Cable News Network LP, LLLP

SUSANNA M. LOWY
ANTHONY M. BONGIORNO
NAOMI B. WALTMAN
CBS BROADCASTING INC.
1515 Broadway, 51st Floor
New York, NY 10036
Counsel for CBS Broadcasting Inc.

STUART D. KARLE
DOW JONES & COMPANY, INC.
200 Liberty Street
New York, NY 10281
Counsel for Dow Jones & Company, Inc.

MARK A. HINUEBER
STEPHENS MEDIA GROUP
P.O. Box 70
Las Vegas, NV 89125
Counsel for DR Partners d/b/a Stephens Media Group

BARBARA W. WALL
GANNETT CO., INC.
7950 Jones Branch Drive
McLean, VA 22107
Counsel for Gannett Co., Inc.

ROBERT BEIZER
GRAY TELEVISION, INC.
1750 K Street N.W.,
No. 1200
Washington, DC 20006
Counsel for Gray Television, Inc.

YVETTE MILLER
GRUNER + JAHR USA PUBLISHING
375 Lexington Avenue
New York, NY 10017
Counsel for Gruner + Jahr USA Publishing

EVE BURTON
JONATHAN DONNELLAN
THE HEARST CORPORATION
1345 Sixth Avenue,
Tenth Floor
New York, NY 10019
Counsel for The Hearst Corporation

GUY R. FRIDDELL, III
LANDMARK COMMUNICATIONS, INC.
150 W. Brambleton Avenue
Norfolk, VA 23510
Counsel for Landmark Communications, Inc.

CHRISTOPHER J. NOLAN
MAGAZINE PUBLISHERS OF AMERICA
919 Third Avenue
New York, NY 10022
Counsel for Magazine Publishers of America

GREGG D. THOMAS
HOLLAND & KNIGHT LLP
100 N. Tampa Street, Suite 4100
Tampa, FL 33602
Counsel for Media General, Inc.

TONDA RUSH
KING & BALLOW
P.O. Box 50301
Arlington, VA 22205
Counsel for National Newspaper Association

NEAL A. JACKSON
DENISE B. LEARY
NATIONAL PUBLIC RADIO, INC.
635 Massachusetts Avenue, N.W.
Washington, DC 20001
Counsel for National Public Radio, Inc.

SUSAN E. WEINER
NBC UNIVERSAL
30 Rockefeller Plaza
New York, NY 10112
Counsel for NBC Universal

STEPHEN FUZESI, JR.
RANDY SHAPIRO
NEWSWEEK, INC.
251 West 57th Street
New York, NY 10019
Counsel for Newsweek, Inc.

KATHERINE J. TRAGER
JON P. FINE
RANDOM HOUSE, INC.
1745 Broadway
New York, NY 10019
Counsel for Random House, Inc.

LUCY A. DALGLISH
GREGG P. LESLIE
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
Counsel for Reporters Committee for Freedom of the Press

BRUCE W. SANFORD
ROBERT D. LYSTAD
BRUCE D. BROWN
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.,
Suite 1100
Washington, DC 20036
Counsel for Society of Professional Journalists

DAVID S. BRALOW
STEPHANIE S. ABRUTYN
TRIBUNE COMPANY
220 E. 42nd Street, Suite 400
New York, NY 10017
Counsel for Tribune Company

MARY ANN WERNER
ERIC LIEBERMAN
THE WASHINGTON POST
1150 15th Street, N.W.
Washington, DC 20071
Counsel for The Washington Post

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INTEREST OF THE *AMICI CURIAE*

Amici are publishers, broadcasters, cable networks and organizations of journalists and publishers.[1] In the last two years at least a dozen journalists employed by many of these *amici* have been held in contempt or placed at risk of contempt simply for honoring what they understand to be their professional ethical obligations to their sources. The penalties imposed in recent months on the Petitioners and other journalists dwarf any others in American history. Absent clarification of the applicable law by this Court, the decision below threatens to make compelled disclosure of journalists' confidential sources the norm rather than the rare exception. For this reason alone, the Court should grant *certiorari* and address directly the extent to which the First Amendment and federal common law preclude the compelled disclosure from journalists of the identities of those who seek to disseminate information to the public anonymously.

SUMMARY OF ARGUMENT

1. These cases deserve the attention of this Court because reporters across the country currently face a wave of federal subpoenas demanding the disclosure of their confidential sources and these subpoenas are being enforced through punitive measures of unparalleled severity. The press regularly depends on sources who will speak only on the condition of anonymity. The uncertainty fueled by the decision below renders it much more difficult for any

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[1] A complete list of the *amici* is set out in Appendix A ("App.") to this brief. Citations to the Appendix in the court of appeals are designated "A." Pursuant to S. Ct. R. 37.6, the *amici* state that no counsel for a party to this action authored any portion of this brief *amici curiae* and that no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of the Court pursuant to S. Ct. R. 37.2(a).

reporter to make a credible pledge of confidentiality and threatens to restrict the flow of important information to the public. This Court's intervention is urgently needed to clarify the extent to which reporters can make a promise of confidentiality that will be respected by the federal judiciary, as it routinely is in state courts.

2. The court of appeals' refusal in this case to recognize *any* First Amendment protection for a reporter's commitment to an anonymous source once a grand jury is convened cannot be squared with this Court's jurisprudence affording First Amendment protection to anonymous speech. As the Court has recognized, the First Amendment properly limits government's ability to coerce the disclosure of the identity of anonymous speakers because, without some constitutional protection, a significant amount of protected speech will inevitably be lost to the public. The decision below construes this Court's holding in *Branzburg v. Hayes*, 408 U.S. 665 (1972), in a manner that conflicts with the Court's decisions affording constitutional protection to anonymous speech, decisions that are expressly based on the historic role the press has played in safeguarding the anonymous speaker. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

ARGUMENT

I. THE DECISION BELOW RAISES AN ISSUE OF CENTRAL IMPORTANCE TO THE OPERATION OF A FREE PRESS

A. The Number of Federal Subpoenas Demanding Disclosure of Reporters' Sources Has Reached Unprecedented Levels

For more than twenty-five years following this Court's decision in *Branzburg*, subpoenas issued by federal courts seeking the disclosure of journalists' confidential sources

were rare. *Amici* are not aware of any journalist who was finally adjudged in contempt or imprisoned for refusing to disclose a confidential source in a federal criminal matter during the last quarter of the twentieth century. That situation, however, has now changed dramatically. An unusually large number of subpoenas seeking the names of anonymous sources has been issued by federal courts in a remarkably short period of time, many to these *amici* and the journalists they employ. Indeed, just three matters in Washington, D.C. have recently generated subpoenas to roughly two dozen reporters and news organizations seeking confidential sources, seven of whom have already been held in contempt in less than a year. [2]

The decision below reflects this new willingness by some federal courts to enforce such subpoenas and impose severe sanctions against journalists. In fact, *amici* are aware of only two decisions from 1976-2000 arising from subpoenas issued by federal grand juries or prosecutors to journalists seeking confidential sources. Both involved alleged leaks to the media and both quashed the subpoenas. *In re Williams*, 963 F.2d 567 (3d Cir. 1992) (en banc); *In re Grand Jury Subpoenas*, 8 Media L. Rep. 1418 (D. Colo. 1982).

Yet since 2000, three federal courts of appeals have affirmed contempt citations issued to reporters who declined to reveal confidential sources, each time imposing prison sentences more severe than any previously known to have been experienced by journalists in American history.[3] In

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[2] By way of comparison, the last significant survey of news organizations conducted in 2001 by *amicus* Reporters Committee for Freedom of the Press revealed only two subpoenas seeking confidential source identities issued from any judicial or administrative body that year, federal or state. *See* www.rcfp.org/agents/material.html (last visited May 13, 2005).

[3] On those relatively rare occasions in the past when courts did hold reporters in contempt for declining to reveal sources, penalties were

2001, free-lance writer Vanessa Leggett served nearly six months in prison for declining to reveal sources of information related to a notorious murder, almost four times longer than any prison term previously imposed on any reporter by any federal court. *In re Grand Jury Subpoenas*, 29 Media L. Rep. 2301 (5th Cir. 2001) (per curiam). Earlier this year, James Taricani, a reporter for WJAR-TV in Rhode Island, completed a four-month sentence of home confinement for declining to reveal who leaked a videotape capturing alleged corruption by public officials in Providence. *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004). And the decision below ordering two reporters to prison for up to eighteen months, if allowed to stand, would result in the most severe contempt penalty ever imposed by an American court on a journalist for refusing to disclose a confidential source.

Decisions such as these have encouraged private litigants and the federal courts adjudicating their cases to demand confidential source information from reporters in similarly unprecedented fashion. In one pending civil suit, five reporters employed by *The New York Times*, *Los Angeles Times*, *Associated Press* and *CNN* have been held in contempt and subjected to fines of $500 per day each for declining to reveal their confidential sources of information about Dr. Wen Ho Lee, who claims such information was provided to them by government agents in violation of the

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largely symbolic. One commentator surveying early cases noted "a certain judicial reluctance to hold the newsman in contempt where this eventuality can conveniently be avoided." Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61, 74 (1950). The longest sentence previously known to have been served by a reporter for refusing to reveal a source was 46 days in a case arising shortly after *Branzburg*. *See Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); www.rcfp.org/jail.html (*Los Angeles Herald-Examiner* reporter William Farr).

Privacy Act. *See Lee v. U.S. Dep't of Justice*, 327 F. Supp. 2d 26 (D.D.C. 2004); *Lee v. U.S. Dep't of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003). Contempt proceedings are currently pending against a sixth reporter in the same case. The six reporters include three Pulitzer Prize winners. The district court in the *Lee* case has expressly left open the possibility of additional, more severe sanctions if its contempt orders are affirmed on appeal. *See Lee*, 327 F. Supp. 2d at 33. And, in the wake of the success of Dr. Lee and the Respondent in this case, the plaintiff in another civil suit alleging violations of the Privacy Act, Dr. Steven Hatfill, issued subpoenas to a dozen news organizations seeking to compel an even larger number of reporters to disclose the identities of their confidential sources.[4]

Today, reporters and their potential sources operate in a far more uncertain and risky environment as a result of the approach to the reporters' privilege taken by the federal courts in all of these cases, most especially in the decision below. *Amici* journalists and news organizations currently face a realistic prospect of substantial prison terms and escalating fines for honoring promises to sources that in the past could confidently be made without fear of sanction.

B. Confidential Sources Are Often Essential to Informing the Public About Matters of Vital Concern

At bottom, the decision below warrants review because the uncertainty it has engendered threatens to jeopardize the flow of information to the public. The press "serves and was designed to serve [by the Founding Fathers] as a powerful

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[4] *Special Report: Reporters and Federal Subpoenas*, Reporters Comm. for Freedom of the Press, www.rcfp.org/shields_and_subpoenas.html (last visited May 13, 2005).

antidote to any abuses of power by governmental officials." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). The press cannot effectively perform this constitutionally recognized role without the ability to maintain the confidentiality of those sources who will speak only on a promise of anonymity. Unless this Court acts, the public's ability to receive information about its government through the press will be substantially impaired.

There can be no genuine dispute that journalists regularly depend on anonymous sources to report stories about the operation of government and other matters of public concern. One recent examination of roughly 10,000 news media reports concluded that fully thirteen percent of front-page newspaper articles relied at least in part on anonymous sources.[5] While there is healthy debate within the journalism profession about the appropriate uses of anonymous sources, all sides of that debate agree that confidential sources are at times essential to effective news reporting.[6]

In recent proceedings in the federal courts, journalist after journalist has convincingly testified about the important role confidential sources play in enabling them to report about matters of manifest public concern.[7] As WJAR reporter James Taricani testified before being sentenced to house arrest:

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[5] *See generally State of the News Media 2005*, www.stateofthemedia.org /2005/index.asp (last visited May 13, 2005).

[6] *See generally Reporters and Confidential News Sources Survey 2004*, www.firstamendmentcenter.org/news.aspx?id=14922 (last visited May 13, 2005).

[7] Attached to this brief as Appendix B is a compendium of affidavits recently submitted to federal courts by journalists employed by these *amici* documenting the indispensable role played by confidential sources in their reporting about public matters.

> In the course of my 28-year career in journalism, I have relied on confidential sources to report more than one hundred stories, on diverse issues of public concern such as public corruption, sexual abuse by clergy, organized crime, misuse of taxpayers' money, and ethical shortcomings of a Chief Justice of the Rhode Island Supreme Court.

App. at B40 ¶5. Indeed, Mr. Taricani described a host of important stories that he could not have reported without providing "a meaningful promise of confidentiality to sources," including a report on organized crime's role in the illegal dumping of toxic waste that sparked a grand jury investigation and a report on the misuse of union funds that led to the ouster of the union president. *Id.* ¶¶ 6-8.

Pierre Thomas, recently held in contempt in the *Wen Ho Lee* case, recounted many similar examples in his testimony in that litigation. Information received from confidential sources enabled Mr. Thomas to report on the progress of the Oklahoma City bombing investigation in a manner that proved instrumental in helping a nervous public understand that the bombing was not the work of foreign terrorists, and his award-winning coverage of the September 11 attacks unearthed important information, provided by confidential sources, about the FBI's advance knowledge of the activities of those responsible for that tragedy. As Mr. Thomas testified: "If I had no ability to promise confidentiality to these sources, they would not have furnished vital information for these articles." *Id.* at B22 ¶ 14(b).

Confidential sources are not only critical to investigative journalists like Messrs. Taricani and Thomas, but are equally important to the daily reporting of more routine news stories. Reporters regularly consult background sources to confirm the accuracy of official news pronouncements and to understand their broader context and significance. A. at 38,

¶ 5 (testimony of Jack Nelson, former *Los Angeles Times* Washington bureau chief, explaining the crucial role that confidential sources played in his reporting through the administrations of six Presidents). Without the ability to speak off the record to sources in the government who are not officially authorized to speak, reporters would be relegated to spoon feeding the public with little more than the "official" statements of public relations officers. *Id.* at 49, ¶ 12 (testimony of Scott Armstrong). For this reason, among others, news reporting based on confidential source material regularly receives the nation's most coveted journalism awards, including the Polk Awards for Excellence in Journalism[8] and the coveted Pulitzer Prize.[9]

Indeed, journalistic experience confirms that, in many circumstances, important information is provided to the press in confidence precisely because the government has taken steps to conceal it by making its unauthorized disclosure

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[8] This year, the Polk Awards for Magazine Reporting, Military Reporting, and Sports Reporting all went to articles based, in significant part, on information and other material provided by confidential sources. *See* www.brooklyn.liu.edu/polk/polk04.html (listing awards).

[9] For example, the 1996 Pulitzer Prize for National Reporting was awarded to the *Wall Street Journal* for its articles reporting on the use of ammonia to heighten the potency of nicotine in cigarettes, which was based on information revealed in confidential, internal reports prepared by a tobacco company. *See, e.g.*, Alix M. Freedman, *'Impact Booster': Tobacco Firm Shows How Ammonia Spurs Delivery of Nicotine*, WALL ST. J., Oct. 18, 1995, at A1. In 2002, the Prize was awarded to the staff of *The Washington Post* "for its comprehensive coverage of America's war on terrorism, which regularly brought forth new information together with skilled analysis of unfolding developments." *See* www.pulitzer.org/year/2002/national-reporting. The *Post*'s series was based, in significant part, on information provided by unnamed public officials, both here and abroad. *See, e.g.*, Barton Gellman, *U.S. Was Foiled Multiple Times in Efforts To Capture Bin Laden or Have Him Killed*, WASH. POST, Oct. 3, 2001, at A1.

unlawful. Standing alone, that latter fact cannot be sufficient justification to conclude, as did the court below, that no First Amendment or other public interest is served in allowing reporters to protect the anonymity of such sources. In the area of national security reporting, for example, journalists and public officials alike have come to recognize that "virtually everything is classified" so that verification of "something as mundane as a press briefing involves talking to scores of sources who are not authorized to add further detail and could be subject to sanctions for doing so." *Id.* at 50, ¶ 13. As a result, most high-level government officials serve as confidential sources at one time or another, in "an untidy but well-established accommodation" that functions as a safety valve allowing vitally important information to be transmitted to the public notwithstanding formal secrecy restrictions. *Id.* at 50, 53, ¶¶ 13, 19.[10]

The information anonymous sources make available to the public through the press is vitally important to the operation of our democracy and the oversight of our most powerful institutions, both public and private. Among the many compelling examples of valuable journalism that would never have been possible if a reporter could not credibly have pledged confidentiality to a source are the following:

Pentagon Papers – The Pentagon's secret history of America's involvement in Vietnam was, of course, leaked to *The New York Times* and *The Washington Post*. *See New York Times Co. v. United States*, 403 U.S. 713 (1971). In

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[10] A survey conducted during the Reagan administration by Harvard University of 483 senior government officials (including two former secretaries of state) found that forty-two percent of the responding officials felt it appropriate to provide information to the press in confidence. *See* Jim Anderson, *Washington News*, UNITED PRESS INTERNATIONAL, Oct. 27, 1986.

refusing to enjoin publication of the leaked information, members of this Court recognized that the newspapers' sources may well have broken the law, *id.* at 754 (Harlan, J., dissenting), and they were in fact prosecuted, albeit unsuccessfully, after later coming forward. *See* Sanford J. Ungar, *Federal Conduct Cited As Offending 'Sense of Justice'; Charges Dismissed in 'Papers' Trial*, WASH. POST, May 12, 1973, at A1. Nevertheless, "[i]n revealing the workings of the government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders had hoped and trusted they would do," *New York Times Co.*, 403 U.S. at 717 (Black, J., concurring), and there is now a broad consensus that there was no legitimate reason to hide the Papers from the public in the first place.[11]

Neutron Bomb – Journalist Walter Pincus relied on anonymous sources in reporting that President Carter planned to move forward with plans to develop a so-called "neutron bomb," a weapon that could inflict massive casualties through radiation without extensive destruction of property.[12] The public outcry in the wake of these news reports spurred the United States to abandon plans for such a weapon and no Administration has since attempted to revive it.[13] Mr. Pincus,

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[11] Solicitor General Erwin N. Griswold, who argued the government's case, wrote some twenty years later that he had not "seen any trace of a threat to the national security from the publication." Erwin N. Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

[12] *See, e.g.*, Walter Pincus, *Carter Is Weighing Radiation Warhead*, WASH. POST, June 7, 1977, at A5; Walter Pincus, *Pentagon Wanted Secrecy On Neutron Bomb Production; Pentagon Hoped To Keep Neutron Bomb A Secret*, WASH. POST, June 25, 1977, at A1.

[13] *See* Don Phillips, *Neutron Bomb Reversal; Harvard Study Cites '77 Post Articles*, WASH. POST, Oct. 23, 1984, at A12 (quoting former Defense Secretary Harold Brown as stating that "[w]ithout the [*Post*] articles, neutron warheads would have been deployed").

who never received a subpoena concerning the neutron bomb or any other matter in his decades-long career, has recently received *two*—one from Respondent and one in the *Lee* case.

Fertility Fraud – In 1996, the *Orange County Register* received the Pulitzer Prize for its reporting on the unethical practices of the previously acclaimed UCI fertility clinic in Irvine, California. Using putatively confidential medical records obtained from an anonymous source, the paper documented how eggs retrieved from one patient were implanted in another, without the knowledge or consent of the donor.[14] The newspaper eventually discovered and reported that at least sixty women were victims of such theft by the clinic.[15] The disclosure of these records to the *Register* may have violated applicable law, yet the facts that the newspaper reported resulted in the criminal prosecution of the physicians involved, "prompted the American Medical Association to rewrite its fertility-industry guidelines," and instigated legislative action.[16]

Enron – In a groundbreaking series of articles published in 2001, the *Wall Street Journal* relied on confidential sources and leaked corporate documents to reveal the illegal accounting practices of a company that had "routinely made published lists of the most-admired and innovative

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[14] Susan Kelleher & Kim Christensen, *Fertility Fraud; Baby Born After Doctor Took Eggs Without Consent*, ORANGE COUNTY REGISTER, May 19, 1995, at A1.

[15] Susan Kelleher, Kim Christensen, David Parrish & Michael Nicolosi, *Clinic Scandal Widens*, ORANGE COUNTY REGISTER, Nov. 4, 1995, at A16.

[16] Kim Christensen, *Fertility Bills Seen as Effective Steps*, ORANGE COUNTY REGISTER, Aug. 30, 1996, at A26.

companies in America."[17] Among other things, confidential sources provided the *Journal* with "confidential" information about two partnerships operated by Enron Chief Financial Officer Andrew Fastow, which were used to hide corporate debt from the company's investors.[18]

Abu Ghraib – In April 2004, CBS News and Seymour Hersh, writing for *The New Yorker*, first reported accounts of abuse of detainees at Abu Ghraib prison in Iraq.[19] Relying on photographs graphically depicting such abuse in the possession of Army officials and a classified report by Major General Antonio M. Taguba that was "not meant for public release,"[20] CBS and Hersh documented the conditions of abuse in the Iraqi prison. After these incidents became public, other military sources who had witnessed abuse stepped forward, but only "on the condition that they not be identified because of concern that their military careers would be ruined."[21]

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[17] Rebecca Smith & John R. Emshwiller, *Trading Places: Fancy Finances Were Key to Enron's Success, And Now to its Distress*, WALL ST. J., Nov. 2, 2001, at A1.

[18] Rebecca Smith & John R. Emshwiller, *Enron CFO's Partnership Had Millions in Profit*, WALL ST. J., Oct. 19, 2001, at C1; John R. Emshwiller & Rebecca Smith, *Corporate Veil: Behind Enron's Fall, A Culture of Operating Outside Public's View*, WALL ST. J., Dec. 5, 2001, at A1.

[19] 60 Minutes II, Apr. 28, 2004, www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml?CMP=ILC-SearchStories; Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004.

[20] Hersh, *supra* note 19.

[21] *See, e.g.*, Todd Richissin, *Soldiers' Warnings Ignored*, BALT. SUN, May 9, 2004, at 1A (interviewing anonymous soldiers who had witnessed abuse at Abu Ghraib); Miles Moffeit, *Brutal Interrogation in Iraq*, DENVER POST, May 19, 2004, at A1 (relying on confidential "Pentagon documents" and interview with a "Pentagon source with knowledge of internal investigations into prisoner abuses").

BALCO – In 2004, the *San Francisco Chronicle* published details of grand jury testimony given by some of the most prominent athletes in professional sports, part of a Pulitzer-Prize winning series of articles about the extent to which performance-enhancing drugs had infiltrated both professional and amateur sports.[22] Baseball players Barry Bonds and Jason Giambi and other prominent athletes testified before the federal grand jury investigating the distribution of undetectable steroids by the Bay Area Laboratory Cooperative ("BALCO"). In some instances, their testimony was squarely at odds with their public denial of steroid use.[23] While the *Chronicle's* sources may have violated grand jury secrecy rules, the newspaper's reporting led to congressional hearings on steroid use in Major League Baseball as well as a decision by its Commissioner to tighten rules regarding the use of banned substances.

The decision below plainly threatens this kind of journalism. The compelled disclosure of the sources that enabled the press to report these stories "undoubtedly would have a ripple effect, silencing whistleblowers and other government employees who might otherwise cooperate with the press in exposing government wrongdoing." A. at 39, ¶ 7. As has been explained by *New York Times* reporter Jeff Gerth, another Pulitzer Prize-winning reporter who has recently been held in contempt by a federal court:

> Compelling journalists to testify about their conversations with confidential sources will inevitably hinder future attempts to obtain

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[22] *See, e.g.*, Mark Fainaru-Wada & Lance Williams, *Giambi Admitted Taking Steroids*, S.F. CHRONICLE, Dec. 2, 2004, at A1; Mark Fainaru-Wada & Lance Williams, *What Bonds told BALCO Grand Jury*, S.F. CHRONICLE, Dec. 3, 2004, at A1.

[23] *See, e.g.*, Mark Fainaru-Wada & Lance Williams, *Sprinter Admitted Use of BALCO 'Magic Potion,'* S.F. CHRONICLE, June 24, 2004, at A1.

> cooperation from those or other confidential sources. It creates the inevitable appearance that journalists either are or can be readily converted into an investigative arm of either the government or of civil litigants. . . . Persons who would otherwise be willing to speak to me would surely refuse to do so if they perceived me to be not a journalist who keeps his word when he promises confidentiality. . . .

App. at B37 ¶ 15. *Los Angeles Times* reporter and Pulitzer Prize recipient Bob Drogin, also now in contempt of a federal court, similarly expressed this undeniable truth during his deposition in the *Lee* litigation:

> I have thought long and hard about this, and unlike you attorneys here in the room, I do not have subpoena power or anything else to gather information. I have what credibility I have as a journalist, I have the word that I give to people to protect their confidentiality. If I violate that trust, then I believe I can no longer work as a journalist.[24]

Especially in the wake of the court of appeals' decision in this case, the Court's guidance is essential to preserve the ability of the American press to engage in this kind of reporting that would be impossible if journalists were powerless to make commitments of confidentiality in appropriate circumstances. *Amici* respectfully submit that a

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[24] Dep. of R. Drogin, *Lee v. U.S. Dep't of Justice*, Civ. A. No. 99-3380, Jan. 8, 2004, at 38:2-9. In an affidavit submitted in that same proceeding, Mr. Drogin recounted his necessary reliance on confidential sources to report about such matters as Saddam Hussein's efforts to circumvent U.N. sanctions, the failure of U.S. weapons inspectors to find post-war evidence of weapons of mass destruction, and the extent of North Korea's nuclear ambitions. App. at B2-B5 ¶¶ 3-4.

compilation of those serious crimes that have in fact gone unresolved because a journalist was permitted to protect his source would be a very short list indeed and would pale in comparison to the scores of news reports containing valuable information gleaned from confidential sources. Thus, while it is undoubtedly true that "[t]he right to remain anonymous may be abused when it shields fraudulent conduct," it remains the case that, "in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre*, 514 U.S. at 357.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PROTECTION OF ANONYMOUS SPEECH AND THE HISTORICAL TRADITION ON WHICH THAT PROTECTION IS PREMISED

Notwithstanding the overwhelming evidence that confidential sources are essential to effective news reporting, the court of appeals read this Court's decision in *Branzburg* as holding that the First Amendment is simply irrelevant when a grand jury demands identification of a reporter's confidential sources. Petitioners persuasively demonstrate that the court of appeals' construction of *Branzburg* is at odds with the decisions of several of its sister circuits, and our purpose is not to repeat those arguments here. From the perspective of these *amici*, the overarching point is that the court of appeals' conclusion cannot be squared with this nation's historic tradition of protecting outlets for anonymous speech. The First Amendment's protection of such expression is grounded firmly in the experience of the Colonial-era press, which fought valiantly to protect the anonymity of those who often spoke through its pages. Everything this Court has said about the protection of anonymous speech under the First Amendment, in every other context and particularly in several post-*Branzburg* decisions, supports the journalistic experience described

above and is inconsistent with the court of appeals' interpretation of *Branzburg* in this case.

In a variety of decisions addressing anonymous speech outside the context of the reporters' privilege, this Court has emphasized that the right to speak to the public anonymously is protected by the First Amendment in significant part because, when the Bill of Rights was enacted, the Founders understood the importance of such speech to maintaining an informed citizenry. In *Talley v. California*, this Court expressly recognized that the First Amendment was enacted in significant part to ensure that printers, the "press" of their day, could not be compelled by the government to reveal the identities of those authors whose works they had agreed to disseminate anonymously:

> Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names.

362 U.S. 60, 64-65 (1960).

More recently, in his concurring opinion in *McIntyre*, Justice Thomas described the experience of the eighteenth century "news media," which then consisted largely of journals that were really collections of contributions from individual authors. Those authors not infrequently requested anonymity and their identities were therefore known only to the printers, who fought to honor the promises of confidentiality they had made against efforts by colonial authorities to compel the disclosure of their authors' identities. *McIntyre*, 514 U.S. at 360 (Thomas, J.,

concurring). Indeed, the controversy that is credited with first establishing uniquely American principles of freedom of the press – the prosecution and acquittal of New York publisher Jon Peter Zenger on charges of seditious libel – arose out of Zenger's refusal to identify the source(s) of material appearing in his newspaper harshly criticizing New York's royal government. Even after Zenger was arrested and charged with criminal responsibility as the publisher, he maintained his refusal to disclose his "sources." *Id.* at 361.

Similarly, in 1779, Elbridge Gerry and other members of the Continental Congress sought to institute proceedings to compel a Pennsylvania newspaper publisher to identify the author of a column criticizing the Congress. Ultimately, arguments that "'[t]he liberty of the Press ought not to be restrained'" prevailed and the Congress did not take action to compel such disclosure. *Id.* at 361-62 (citation omitted). In 1784, the New Jersey Legislature embarked on another unsuccessful effort to compel a newspaper editor to identify the author of a critical article. *Id.* at 362-63. These episodes were fresh in the mind of the Framers who, as Justice Thomas chronicled in *McIntyre*, unanimously "believed that the freedom of the press included the right to publish without revealing the author's name." *Id.* at 367.

While journalism has changed dramatically since the late eighteenth century, today's reporters, publishers and broadcasters perform essentially the same function as their Colonial-era predecessors: exercising their editorial judgment to enable some anonymous sources of information and opinion to reach a broad audience. Indeed, when newspaper editor Isaac Collins refused to comply with the New Jersey Legislature's demands discussed above on the grounds that to testify would "'betray the trust reposed in me, and be far from acting as a faithful guardian of the Liberty of the Press,'" he articulated exactly the same reasons why

Petitioners and other journalists employed by many of these *amici* have respectfully declined to comply with the subpoenas served on them. *Id.* at 362 (citation omitted).

The enduring lessons this Court has drawn from history validate *amici*'s showing that important information will be lost to the public if journalists cannot reliably promise anonymity to sources. The underlying rationale permeating almost all of this Court's decisions protecting the right to speak anonymously is that without effective legal protection of that right, would-be speakers will remain silent and a significant amount of important speech will be lost. Thus, in *Talley*, this Court invalidated an ordinance requiring that leaflets identify an author on the grounds that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." 362 U.S. at 65. In *McIntyre*, the Court recognized that election workers may well decide to remain anonymous out of "fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." 514 U.S. at 341-42.[25] The same logic applies to those anonymous sources who turn to journalists as their conduit to the public. Indeed, two centuries of evidence and

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[25] *See also Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 166 (2002). Communications between a journalist and a source are far more analogous to the personal leafleting and canvassing at issue in *Talley*, *McIntyre* and *Watchtower* than to the campaign finance disclosure provisions approved in both *McConnell v. FEC*, 540 U.S. 93 (2003), and *Buckley v. Valeo*, 424 U.S. 1 (1976), on the grounds that they deter systemic political corruption. In fact, even in the campaign finance context, exceptions to the constitutionality of compelled disclosure provisions have been recognized where there is a "'reasonable probability'" that disclosure would subject an individual wishing to remain anonymous to "'threats, harassment or reprisals.'" *McConnell*, 540 U.S. at 198 (citation omitted). Both history and the experience of journalists demonstrate that is precisely why reporters' sources request anonymity.

experience effectively answer *Branzburg*'s query about whether any "significant constriction of the flow of news to the public" would result from compelling journalists to divulge the names of their sources. 408 U.S. at 693.

Finally, the lessons of history after the Revolutionary era underscore why journalists find themselves at a crossroads at this moment, and why it is therefore important for this Court to review and resolve, once and for all, this issue of obvious public importance. While we are not aware of any specific surveys on the topic, what evidence exists strongly suggests that, apart from an historical exception or two that actually proves the rule, the criminal justice system has for the most part voluntarily left journalists alone. There appear to be no reported judicial decisions addressing subpoenas to reporters until roughly the beginning of the twentieth century. Only roughly a half-dozen can be found prior to the 1950s, and several of those arose because the journalist himself was the target of a criminal investigation. *See id.* at 685-86 (citing cases).[26] And, as the Petitioners have explained, during those brief, exceptional periods when subpoenas were issued to reporters in significant numbers, most notably in the years immediately surrounding this Court's decision in *Branzburg*, both the states and most lower federal courts promptly responded by recognizing a formal legal privilege. History thus demonstrates that both "reason and experience" support the same result as a matter of federal common law. *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

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[26] Indeed, prior to the late 1960s, we are aware of only two federal court decisions related to federal grand jury or criminal trial subpoenas issued to journalists, and both excused the reporters from testifying on grounds unrelated to privilege. *See Burdick v. United States*, 236 U.S. 79 (1915) (journalist was entitled to assert a Fifth Amendment privilege); *Rosenberg v. Carroll*, 99 F. Supp. 629 (S.D.N.Y. 1951) (excusing journalist because information sought was not sufficiently relevant).

The recent surge in the number of subpoenas, the dramatic increase in the severity of contempt penalties, the startling pronouncement by the court of appeals in this case that the First Amendment has no bearing on the issue and its inability to agree whether federal common law even speaks to the question all stand in marked contrast to this nation's historic tradition of respecting both the right to speak anonymously in general and the ability of the press to act as a conduit for such anonymous speech in particular. If the Court does not seize this opportunity to address this vital issue, other courts will surely follow the lead of the D.C. Circuit and these trends will only accelerate in a manner that will fundamentally impact the ability of the American public to receive information about the operation of its government and the state of the world in which we live.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to grant the petitions for *certiorari*.

Respectfully submitted,

LEE LEVINE*
DAVID A. SCHULZ
NATHAN E. SIEGEL
THOMAS CURLEY
LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
1050 17TH STREET, N.W., SUITE 800
WASHINGTON, D.C. 20036
TELEPHONE: (202) 508-1100
FACSIMILE: (202) 861-9888
Counsel for Amici Curiae

* *Counsel of Record*